

PR#9833

SMITHEE, DEREK

4/16/2009

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,
Plaintiff,

vs. CASE NO. 05-CV-00329-GKF SAJ

TYSON FOODS, INC., et al.,
Defendants.

DEPOSITION OF DEREK SMITHEE
TAKEN ON BEHALF OF THE DEFENDANTS
ON APRIL 16, 2009, BEGINNING AT 9:00 A.M.
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES:

On behalf of the PLAINTIFF:

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EXHIBIT

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1 Oklahoma Conservation Commission.

2 A. Okay.

3 Q. So that's where I'm going, but perhaps the
4 specific programs will be an easier way to address it.

5 A. Okay.

6 Q. Let's first go to Exhibit No. 2. Can you
7 give me a general description of what these
8 spreadsheets are that are marked OWRB Response
9 Costs 0001, and I believe those go through 31, and
10 then there are some summary pages after that?

11 A. Am I free to reorder these for clarity?

12 Q. Absolutely.

13 A. Okay, what Exhibit 2 is. Every -- the
14 Beneficial Use Monitoring Program is a wholly state
15 supported monitoring program evaluating the state's
16 waters of which obviously the Illinois River Watershed
17 is a significant and important part.

18 What you have in Exhibit 2 is the analyses
19 that were conducted in the Illinois River Watershed,
20 Illinois River Walk, Baron Fork, Eldon, on and on and
21 on and the laboratory costs associated with that work.

22 Those are then captured in item 6 of the
23 summary and BUMP since its inception in 1998, of
24 \$290,000, that include -- that \$290,000 is laboratory
25 costs and personnel costs for the BUMP program to be

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1 executed in the Illinois River Watershed.

2 Q. All right. If we look at pages 1 through
3 32, do all of these pages relate to the BUMP program?

4 A. I don't even see a 32. Okay, it is the
5 summaries that I reordered for myself.

6 Q. Yes, this is my 32?

7 A. That's correct.

8 Q. And page 32 is a summary of pages 1 through
9 31; is that correct?

10 A. That is correct.

11 Q. Are pages 1 through 31 a summary of all the
12 sampling that you could document associated with the
13 BUMP program?

14 A. Yes.

15 Q. It is really --

16 A. I will say yes.

17 Q. Are you hesitating or --

18 A. I'm hesitating because some of these numbers
19 don't look right to me. They don't look right to me.

20 Q. I'm a little confused about the numbers,
21 too. Maybe we can figure this out together.

22 A. Okay.

23 Q. These numbers are hard to read, I
24 understand, but on page 31, it looks like these
25 columns at the bottom are essentially the same as what

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1 we have on 32, it is just blown up?

2 A. The summary numbers, is that what you're
3 talking about?

4 Q. Let's look over here. I think these numbers
5 --

6 A. Right.

7 Q. -- are the same as what we have on page 132?

8 A. I think that's correct.

9 Q. Okay. Let's mark those on page 31, if you
10 can just mark those and say see page 32, and then we
11 can read them on page 32.

12 A. Okay.

13 Q. On page 32, it appears that the total costs,
14 including personnel costs documented are \$206,074. Do
15 you see that?

16 A. I do.

17 Q. But if we turn over to --

18 A. To my spreadsheet.

19 Q. Your spreadsheet on page 34?

20 A. Shows 290,000.

21 Q. It says approximately 290,000. So can you
22 explain the difference here?

23 A. I'm going to try. We had a really hard time
24 on personnel costs and lab -- lab costs were pretty
25 straightforward.

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1 Q. What are you looking at now?

2 A. I'm looking at this, this is exactly the
3 same as exhibit whatever it was here, the microprint.

4 Q. Exhibit No. 2?

5 A. Exhibit No. 2, this is macro print. This is
6 what went into that, and I have got different
7 personnel costs here than what are outlined -- I mean
8 the lab costs are the same, but the personnel costs
9 are different, and that's what I'm trying to figure
10 out.

11 If I recall, when Bill and I went over
12 this --

13 Q. For the record, Bill who?

14 A. Bill Cothran is my monitoring section head,
15 I'm sorry. He had incorrectly calculated the costs
16 per site per visit, and we recalculated the cost per
17 site per visit. He had it as 106 and it was actually
18 367, and so when we recalculated it, it came out to --
19 instead of 83,000, this should have been amended to
20 166,000.

21 So these are the actual costs, personnel
22 costs for BUMP in the Illinois River Watershed,
23 personnel was 167 and lab was 122.5.

24 Q. Looking at pages --

25 A. And you are free to have anything you

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1 exhibit page number 32 of Exhibit No. 2.

2 The lab cost table is identical on both of
3 these pages; correct?

4 A. Yes.

5 Q. And those are just the totals added up from
6 pages 1 really through 31 of Exhibit No. 2; is that
7 correct?

8 A. Each year being different.

9 Q. I understand. And then we discussed that
10 the state's claim now for all other costs other than
11 lab costs relating to the BUMP program is the amount
12 shown on Exhibit No. 6, which is \$166,950; is that
13 correct?

14 A. Correct.

15 Q. And so if we add these two sums together,
16 what is the total as it is shown in Exhibit 6?

17 A. \$289,549 and zero cents.

18 Q. And is that the total amount of the state's
19 claim for costs incurred in relation to the BUMP
20 Project?

21 A. Yes.

22 Q. And if I understand the remainder of Exhibit
23 6 is just larger print of the same information that's
24 contained in Exhibit No. 2?

25 A. I hit print and that's what I got, yes.

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1 every five years, 303(d) is every two. But they have
2 since consolidated and that is what is called the
3 consolidated report and it is one big report and it is
4 done every year.

5 Q. So the monitoring that we have discussed
6 here for the BUMP and the reporting that goes along
7 with that, that is not monitoring that's done in
8 response to any particular event in the watershed?

9 MR. LENNINGTON: Object to the form.

10 Q. (BY MS. HILL) Is it? You may answer.

11 A. Some of it is.

12 Q. Tell me about that.

13 A. Prior to 1998, we had heard anecdotally the
14 water quality in the Illinois River had deteriorated,
15 but we did not have data to support or refute that
16 anecdotal conclusion.

17 When we started monitoring with BUMP, Eureka
18 in the first couple of years we did identify with data
19 that it does in fact have some problems. So we
20 increased our sampling frequency to determine, well
21 what, how bad and extensive is this problem, where is
22 it spatially located. If we could have contributed
23 source, we would. And our data showed that the
24 Illinois River did imperically have water quality
25 problems, so we monitored it more frequently or for

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1 additional parameters.

2 So BUMP at its heart is designed to evaluate
3 all of the state's waters and compare the standards,
4 but it also had some dollars set aside for us to
5 clarify how extensive or what the magnitude of that
6 problem is when we find it.

7 Q. So you had additional monies set aside in
8 BUMP to do more monitoring as the years went by?

9 A. As money and time allowed, yes.

10 Q. And you have described here on page 3 of
11 Exhibit No. 6 that there were a few years that you had
12 an increase in site visits to the Illinois River
13 Watershed, from about 2002 through maybe 2000 and
14 -- I'm reading it backward -- 5 and then it just
15 dropped back off.

16 A. Uh-huh, that's correct.

17 Q. Tell me about these personnel visits, for
18 instance, in 19 -- let's just start at 1999, you have
19 85 personnel visits. Were those 85 site visits part
20 of a schedule that was set out, you know, at the
21 beginning of the year that these specific sites will
22 be sampled X number of times?

23 A. Yes.

24 Q. And is that true for each of the following
25 years that the number of site visits were set out on a